United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-2119

To be argued by
BARRY DORFMAN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. DOLLREE MAPP and ALAN LYONS,

Petitioners-Appellants,

- against -

WARDEN, New York State Correctional Institution for Women, Bedford Hills, New York; and WARDEN, Great Meadow Correctional Facility, Comstock, New York

Respondents-Appellees.

BRIEF FOR RESPONDENTS-APPELLEES

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BRIEF FOR RESPONDENTS-APPELLEES

Preliminary Statement

This is an appeal from an order of the United States District Court for the Eastern District of New York (Bruchhausen, J.), dated April 24, 1975, which dismissed appellants' application for a writ of habeas corpus. On July 22, 1975, this Court granted appellants a certificate of probable cause.

Questions Presented

1. Whether information received from the informant corroborated by independent police investigation and observation established probable cause for issuance of the search warrant?

2. Whether appellants have rebutted the presumption of correctness attaching to state court determinations of fact under 28 U.S.C. 2254(d) with respect to their claim that there existed "material inconsistencies" between the allegations of the affidavit and the affiant's sworn testimony, and in any event, whether such alleged inconsistencies required suppression of the warrant?

3. Whether appellant Lyons has the standing to challenge the search of the Nashville Boulevard premises and the seizure of rent receipts there, and in any event, whether seizure of the rent receipts was justified?

4. Whether disclosure of the informant was required where independent police investigation corroborated the informant's recitation, and in itself supplied probable cause for issuance of the search warrant?

5. Whether the sufficiency of evidence at a state court trial is properly cognizable in a habeas corpus review; whether appellant Mapp has satisfied the exhaustion requirement of 28 U.S.C. 2254(b) with respect to such claim; and in any event, whether appellant's conviction was based on any evidence?

FACTS

On May 2, 1973, after a trial by jury in the Supreme Court of the State of New York, Queens County (Balbach, J.), appellants Dollree Mapp and Alan Lyons were convicted of criminal possession of a dangerous drug in the first degree. They were each sentenced to a prison term of twenty years to life.

The Search Warrant and Affidavit

Over one pound of heroin was recovered on February 18, 1970, pursuant to a search warrant obtained on the strength of an affidavit sworn to February 13, 1970, by John Bergersen, a New York City detective, Narcotics Division, Special Investigating Unit.*

Bergersen's affidavit stated that on October 6, 1969, he had been advised by an unreliable confidential informant that appellants were processing and packaging heroin in apartment 2R at 155-15 North Conduit Avenue, Queens, and storing the narcotics at 118-46 Nashville Boulevard, Queens. At that time, the informant provided a physical description of both Mapp and Lyons.

*The affidavit is reproduced in full in appellant Mapp's brief to this Court at pages 6-7 and appellant Lyons' brief at pages 5-6

The affidavit further recited that the informant had been told by appellant Mapp on February 1, 1970, that she and appellant Lyons were going to "bag-up" all that day and could be reached at a certain telephone number. A check of telephone records revealed that the number given was listed to one Harold Smalls at apartment 2R, 155-15 North Conduit Avenue, Queens. Bergersen's affidavit stated that on February 1, 1970, he followed Mapp and Lyons from the Nashville Boulevard address to the North Conduit Avenue address, where appellants entered apartment 2R.

The affidavit further stated that on February 5, 1970, the informant said he was told by appellant Mapp that she and Lyons were going to "bag-up" all day February 8, 1970. On that date, the affiant declared that he followed petitioners from the Nashville Boulevard address to the North Conduit Avenue address, and while inside the premises, heard Mapp say to Lyons, "We're going to have to bust our mother-fucking asses to get this shit bagged up by tomorrow." Appellants thereupon entered apartment 2R.

The affiant then stated that on February 9, 1970, he showed a photograph of appellant Mapp to the secretary of the sales and management agent of the building at 115-15 North Conduit Avenue, and she identified Mapp as the person who paid the rent for apartment 2R at that address.

The affidavit further recited that according to the informant, appellants Mapp and Lyons "bag-up" heroin and marijuana at the Nashville Boulevard premises. On November 6, 1969, one Detective Sylvan Topel called a telephone number listed to Maudell Mapp at the Nashville Boulevard address and listened in to a conversation between the informant and Mapp, wherein Mapp indicated she then had narcotics in her house.

Finally, the affidavit declared that on January 13, 1970, appellant Lyons sold a quantity of heroin to an undercover police officer.

On the basis of the information contained in Bergersen's affidavit, a search warrant was issued on February 13, 1970, covering the Nashville Boulevard premises, the North Conduit Avenue premises, as well as the persons of both appellants herein. The warrant described the items to be seized as "heroin, and other narcotic drugs."

Execution of the Search Warrant

On the morning of February 18, 1970, Detective Bergersen secreted himself in the second floor stairwell at the North Conduit Avenue address and observed appellants enter apartment 2R. Shortly thereafter the door to apartment 2R opened and Bergersen

saw appellant Mapp about to leave. As she left the apartment she turned and said, "When you finish those bundles, bring them home" (A 336).*

Not long after Mapp's departure, appellant Lyons emerged from apartment 2R, whereupon he was confronted by Bergersen who showed him the search warrant. A search of Lyons' person revealed a brown paper bag containing 499 glassine envelopes containing a white powder, later found to be heroin. Bergersen (in the company of one Detective Wilson) then entered apartment 2R where they found upon a table and seized (among other things) assorted heroin processing paraphernalia and a quantity of white powder, later found to be more than one pound of heroin.**

The warrant was executed for a second time on the morning of February 18, 1970, at the Nashville Boulevard premises by Detectives Fink and Wilson. Detective Wilson showed the warrant to appellant Mapp and searched the apartment. During the course of the search, rent receipts for apartment 2R at

*References preceded by the letter "A" refer to pages of appellants' appendix on appeal to the Appellate Division of the New York Supreme Court, which has been filed by appellants as an exhibit in this Court.

**A complete inventory of property seized at both premises pursuant to the warrant is to be found at A 6-g.

155-15 North Conduit Avenue were found in a dresser drawer and seized, as well as a revolver and five rounds of ammunition. No drugs were found at the Nashville Boulevard premises.

Prior Proceedings

Appellants' present convictions are the result of a retrial. Both Mapp and Lyons had been found guilty by a jury in a prior trial on the same charge of criminal possession of a dangerous drug in the first degree. Those convictions were reversed by the Appellate Division on grounds not relevant here, People v. Mapp, 39 A D 2d 539 (2nd Dept. 1972).

A. Motion to Controvert the Warrant and Suppress the Evidence.

Prior to the first trial, appellants moved to controvert the search warrant and to suppress the evidence seized thereunder. A hearing was held in which Detectives Bergersen, Fink and Wilson were called to testify.

The most important witness was Bergersen, whose testimony in sum and substance conformed to the recitals set forth in his affidavit in support of the search warrant. Detectives Fink and Wilson testified as to their respective activities during the search of both the Nashville Boulevard and North Conduit Avenue premises on February 18, 1970.

The trial court denied the motion in an opinion dated November 18, 1970 (O'Connor, J.), finding that the Aguilar test had been satisfied by "objective checking" of the informant's information and the "independent observations" of the police (A 7-h - A 7-i). The court further found that disclosure of the identity of the informant was not required to establish the existence of probable cause (A 7-k).

B. Suppression and Identification Hearing

Prior to the second trial, appellant moved to suppress the rent receipts seized at the Nashville Boulevard premises as well as the identification of appellant Mapp by one Mrs. Joanna Martin.

1. The Identification of Appellant Mapp

At the hearing or the motion, Detective Bergersen testified that in February, 1970 -- prior to drawing his affidavit in support of the warrant, he showed one or two photographs to Joanna Martin (then Joanna Fucello), an employee at the rental office for the North Conduit Avenue premises, and that Martin identified the subject of the photographs as the person who came into the office to pay the rent for apartment 2R. He further testified that the photographs shown to Martin were of appellant Dollree Mapp (A 137 - A 139).

Joanna Martin herself testified that in February, 1970 Detective Bergersen came to her office to show her two pictures. She further testified that she recognized the person in the photographs as "a Mrs. Smalls," who on three occasions paid the rent for apartment 2R in one hundred and eighty-five one dollar bills (A 158 - A 160). The lighting in the office was good and Martin was within three feet from "Mrs. Smalls" (A 161 - A 162).

Mrs. Martin also identified the three rent receipts which she gave to "Mrs. Smalls" for the November and December 1969, and the January, 1970 rent payments (A 169). She stated that appellant Mapp looked like the person known to her as Mrs. Smalls (A 173), and that her positive identification of appellant Mapp at the first trial was based on her recollection of the woman who came to her office to pay the rent (A 191).

2. The Rent Receipts

Detective Wilson testified that he executed the search warrant at the Nashville Boulevard premises on ~~November~~ February 18, 1970. He stated that he showed the warrant to appellant Mapp and searched the premises (A 196 - A 198). During the search he found several rent receipts in a dresser drawer for apartment 2R,

155-15 North Conduit Avenue, and identified five such receipts at the hearing (A 206 - A 207). Wilson said that prior to the search he already knew that someone had been arrested at the North Conduit Avenue premises in connection with the same investigation (A 215); that "Mrs. Smalls" was in fact appellant Mapp and that she, in fact had paid the rent for apartment 2R at 155-15 North Conduit Avenue (A 215 - A 216). Detective Fink, who assisted Wilson in the execution of the warrant, testified in like manner.

The trial court, in an opinion dated November 30, 1972, (Balbach, J.), denied appellants' motion to suppress the identification of Mapp and to suppress the seized rent receipts. The court found that Mrs. Martin's failure to positively identify Mapp at the hearing went only to the weight to be given her testimoney, but not its admissibility, in light of Martin's positive identification of Mapp at the first trial (A 8-b - A 8-c). The court ruled that the rent receipts were lawfully seized under the "plain view" doctrine (A 8-e).

The Trial

The state court trial commenced on January 19, 1973, before Justice George J. Balbach, New York State Supreme Court,

Queens County. The testimony of Detectives Bergersen, Wilson and Fink was in pertinent part and in sum and substance the same as heretofore described.

At trial, Joanna Martin testified that appellant Mapp was "very, very similar" to the woman who paid the rent for apartment 2R in single dollar bills, but could not make a positive identification (A 362). The witness stated, however, that at the prior trial she had positively identified appellant Mapp as the woman who had paid her rent in single dollar bills (A 363).

At this point the trial was interrupted for an additional identification hearing. Detective Bergersen testified that on January 25, 1973, he showed photographs of six different black women to one Dorothy Weiss, formerly employed by the sales and managing agent for the North Conduit Avenue premises. He asked Weiss if she recognized anyone and she selected the photograph of appellant Mapp (A 365 - A 367). Detective Bergersen stated that Mrs. Weiss made the same selection when showed the photographs again in the presence of an assistant district attorney (A 369 - A 370).

Mrs. Weiss testified that in February, 1970, she was employed as a bookkeeper for American Homes, owner of the North Conduit Avenue premises (A 396). In January, 1973, Detective

Bergersen came to her office and showed her six photographs, of which she recognized one (A 400). At the hearing, Weiss was shown the same six photographs and she indicated the one of appellant Mapp as the one she identified in January (A 401 - A 402).

Mrs. Weiss testified that she had seen the person in the photograph at least three times at the office of American Homes where appellant Mapp had come to pay her rent. Weiss remembered her because she payed one hundred dollars of the rent in one-dollar bills (A 402 - A 403). Mrs. Weiss identified appellant Mapp at the hearing as the person whose photograph she selected and as the person who paid her the rent (A 405).

Mrs. Weiss further testified that she did not see Joanna (Fucello) Martin look at any pictures in February, 1970, nor could she recall having been shown any pictures at that time (A 433 - A 434). When recalled at the hearing, Weiss stated that although she had read a news article about Mapp, she had never seen appellant Mapp's picture in the newspapers (A 461).

Joanna Martin testified that she could not recall whether Detective Bergersen showed Mapp's picture to Mrs. Weiss in February, 1970 (A 473). Testimony of Detective Wilson was to the same effect (A 475). The court then denied the motion to suppress the identification of Dollree Mapp by Dorothy Weiss.

Upon resumption of the trial, Mrs. Weiss' testimony was substantially the same as her testimony at the suppression hearing, and she identified Mrs. Mapp in court as the same person who had paid her rent in single dollar bills.

Additional testimony was adduced at trial from various witnesses, but is not relevant to the issues raised here. At the close of the trial, the jury found Dollree Mapp and Alan Lyons guilty as charged.

POINT I

SINCE THE INFORMANT'S COMMUNICATIONS WERE CORROBORATED BY INDEPENDENT POLICE INFORMATION AND INVESTIGATION, AMPLE PROBABLE CAUSE SUPPORTED ISSUANCE OF THE SEARCH WARRANT.*

Appellants assert that there was no probable cause supporting issuance of the search warrant and the evidence obtained as a result of its execution must be suppressed.

*The issue of whether Fourth Amendment claims of unreasonable search and seizure are properly cognizable by way of federal habeas corpus is now before the United States Supreme Court, Wolff v. Rice, 74-1222, and will be argued shortly.

In evaluating the legal sufficiency of Detective Bergersen's affidavit, the question is raised whether it presented sufficient information to the magistrate to convince her as a reasonable and prudent person that there was probable cause to issue the requested warrant. Giordenello v. United States, 357 U.S. 480, 486-487 (1958). The state court had no difficulty in finding that probable cause did exist, and justifiably so (A 7-a - A 7-L).

The challenged affidavit set forth the following facts:

1. On October 6, 1969, the affiant was told by an unreliable informant that Dollree Mapp and Alan Lyons were processing and packaging narcotic drugs in apartment 2R at the North Conduit Avenue address, and storing the packaged drugs at the Nashville Boulevard premises. The informant provided physical descriptions of both Mapp and Lyons.

2. The informant told the affiant that Mapp and Lyons processed heroin and marijuana at the Nashville Boulevard premises. On November 6, 19[redacted]69, one Narcotics Detective Topel called a telephone number listed to Maudell Mapp at the Nashville Boulevard address and listened in to a conversation in which Mapp

told the informant that she then had narcotics in her home.

3. On February 1, 1970, Mapp told the informant that she and Lyons were going to "bag-up" all that day and could be reached at a specified telephone number. Investigation by the affiant revealed that the number was listed to a Harold Smalls, apartment 2R, at the North Conduit Avenue address. In addition, the affiant followed Mapp and Lyons on that date from the Nashville Boulevard premises to the North Conduit Avenue address, where he saw appellants enter apartment 2R.

4. On February 5, 1970, the informant was told by Mapp that she and Lyons were going to "bag-up" all day on February 8, 1970. The affiant followed Mapp and Lyons from the Nashville Boulevard premises to the North Conduit Avenue address on that date and while inside the premises, heard Mapp say to Lyons, "We're going to have to bust our mother-fucking asses to get this shit bagged up by tomorrow." Mapp and Lyons then entered apartment 2R.

5. On February 9, 1970, the affiant showed a photograph of Mapp to an employee of the sales and management agent for the North Conduit Avenue premises who identified Mapp as the person who paid the rent for apartment 2R.

6. On January 13, 1970, Lyons sold a quantity of heroin to a police officer.

Thus, it is clear on the face of the affidavit itself that Detective Bergersen's detailed recitation of the results of his surveillance not only corroborated the information provided by the informant, but may well have provided independent grounds for probable cause as well.

Appellants' approach here is to fragment the affidavit and attempt to show that each fragment, in and of itself, has not constituted probable cause in other cases. However, an affidavit such as this must be construed "in a common-sense and realistic fashion." United States v. Ventresca, 380 U.S. 102, 109 (1965); United States v. Harris, 403 U.S. 573, 579 (1971). Probable cause can only be measured within the facts and circumstances of this particular case. Draper v. United States, 358 U.S. 307 (1959); Bailey v. United States, 389 F.2d 305, 308-309 (D.C. Cir. 1967).

While conceding that an affidavit may be based on hearsay information, Jones v. United States, 362 U.S. 257 (1960), the appellants contend that the unreliable informant's information in this case does not satisfy the requirements set forth in Aguilar v. Texas, 378 U.S. 108, (1964) and Spinelli v. United

States, 393 U.S. 410 (1969).* This argument must fail.

As this Court recently noted, "When an affiant seeking a search warrant relies on hearsay, he must, pursuant to Aguilar and Spinelli, supra, set forth in the warrant application 'some of the underlying circumstances' from which the informant drew his conclusions concerning the suspect's criminal activities and disclose some of the reasons which gave assurance of the informant's reliability." United States v. Rollins, __ F.2d__ (2d Cir., Sept. 15, 1975, NYLJ Sept. 29, 1975, p. 1). The affidavit makes clear that appellant Mapp herself was the source of the informant's conclusion regarding appellants' "bagging-up" of heroin on February 1, and February 8, 1970, as well as the fact that appellant Mapp had narcotics at the Nashville Boulevard premises on November 6.

The second element, assurance of the informant's reliability, was amply supplied in the affidavit by police

*The informant here was necessarily styled as "unreliable", not because his information had proved to be irresponsible or untruthful in the past, but merely because his reliability was as yet untested. Indeed, no allegation of an informant's previous reliability has ever been required in an affidavit. United States v. Harris, 403 U.S. 573, 580-581 (1971).

corroboration of his information*. First, a check of telephone company records showed that the telephone number given to the informant by Mapp was listed for apartment 2R, at the North Conduit Avenue address where the informant stated that heroin was being processed and packaged. Second, on the two precise occasions that the informant said appellants were going to "bag-up", Bergersen followed Mapp and Lyons from the Nashville Boulevard location to the North Conduit Avenue premises where he observed them enter apartment 2R. Third, the telephone number which Detective Topel called on November 6 was listed to Maudell Mapp at the Nashville Boulevard address, and Topel heard appellant Mapp admit to having narcotics on the premises. Fourth, the sale of heroin by Lyons to an undercover police officer on January 13, 1970, also reinforced the informant's reliability.

Furthermore, here, as in Draper v. United States, supra (approved in Spinelli v. United States, supra, 393 U.S. at 416-17), the informant's communications described the criminal behavior in sufficient detail to assure that it was gained in a reliable way.

*While "'an untested informant's story may be corroborated by other facts that become known to the affiant, even if they corroborate only innocent aspects of the story'," United States v. Rollins, supra, quoting United States v. Sultan, 463 F.2d 1066, 1069 (1972), the corroboration here went to the criminal details as well.

Additional police investigation and observation not only augmented the above evidence of the informant's reliability, but also enlarged the independent grounds supporting probable cause. Thus, the overheard comment which Mapp made to Lyons on November 8 regarding the great effort required to complete the "bagging-up" served a dual function in validating the affidavit. So too, the police investigation which verified that Mapp paid the rent for apartment 2R had the same effect.

Even if the informant's information alone could not sustain a finding of probable cause, such a result is justified where police investigation and information corroborates the informant's communication. Whitley v. Warden, 401 U.S. 560 567 (1971); United States v. Canieso, 470 F.2d 1224, 1231 (2d Cir. 1972); United States v. Sultan, 463 F.2d 1066, 1068-69 (2d Cir. 1972); United States v. Manning, 448 F.2d 992, 995 (2d Cir.), cert. den. 404 U.S. 995 (1971); United States v. Viggiano, 433 F.2d 716, 718-19 (2d Cir. 1970), cert. den. 401 U.S. 938 (1971). See also, United States v. Harris, 403 U.S. 573, 579 (1971).

In the instant case, there was more than sufficient information and observation outlined in the affidavit to convince the magistrate that the informant's statements were more than

some "meager report" that "could easily have been obtained from an offhand remark at a neighborhood bar." Spinelli v. United States, supra, 393 U.S. at 417 (1969). Rather, this was information "which in common experience may be recognized as having been obtained in a reliable way." Id., at 417-18. Thus, the totality of the circumstances outlined in the affidavit was sufficient to provide probable cause for issuance of the warrant.

POINT II

APPELLANTS HAVE FAILED TO REBUT THE PRESUMPTION OF CORRECTNESS APPLICABLE TO STATE COURT DETERMINATIONS OF FACT UNDER 28 U.S.C. 2254(d) WITH RESPECT TO THEIR CLAIM THAT MISSTATEMENTS IN THE AFFIDAVIT REQUIRED SUPPRESSION OF THE WARRANT. IN ANY EVENT, APPELLANTS HAVE MADE NO SHOWING THAT THE AFFIDAVIT CONTAINS KNOWING AND MATERIAL MISSTATEMENTS.

Appellants claim that alleged "inconsistencies" between Detective Bergersen's affidavit for the search warrant and testimony at the trial and suppression hearings are sufficient to invalidate the warrant.

Insofar as appellant's point to inconsistencies between the affidavit and Bergersen's testimony at the hearing to suppress the warrant, such testimony was before Justice O'Connor who found the facts as recited in the affidavit and ruled against them. Under 28 U.S.C. 2254(d), the factual findings

of the state court should be presumed correct in a federal habeas corpus proceeding, unless appellants have set forth any allegations which would bring the petition within the statutory exceptions which negate the presumption. LaVallee v. Delle Rose, 410 U.S. 690 (1973); United States ex rel. Sabella v. LaFollette, 432 F.2d 572, 574 (2d Cir. 1974), cert. den. 401 U.S. 920; United States ex rel. Preston v. Mancusi, 422 F.2d 940 (2d Cir. 1970). The burden is on appellants to establish by convincing evidence that the factual determination of the state court is erroneous. United States ex rel. Stanbridge v. Zelker, 514 F.2d 45 (2d Cir. 1975); United States ex rel. Regina v. LaVallee, 504 F.2d 580 (2d 985 (2d Cir. 1970). Appellants may not merely seek a re-examination of facts already probed by the state court. United States ex rel. Stanbridge v. Zelker, supra. Appellants have not established that the state court's factual determination was erroneous or that any of the statutory exceptions to 28 U.S.C. § 2254(d) apply here.

Appellants also point to alleged discrepancies between Bergersen's affidavit and testimony elicited at the second suppression hearing and the trial. As far as the record shows,

appellants made no effort in the trial court to reopen the suppression hearing upon learning this information that they now allege casts doubt on the affidavit, People v. Alfinito, 16 N Y 2d 181 (1965), and they have waived their claim for purposes of federal habeas corpus relief.*

The claim itself, however, is based on a misreading of the record and a misapplication of the law. While the rule is not fully settled in the Circuit, this Court has given some approval to the proposition that a misstatement in an affidavit which was knowingly made and material to establishing probable cause would invalidate the warrant. United States v. Gonzalez, 488 F.2d 833, 837-38 (2d Cir. 1973); United States v. Sultan, 463 F.2d 1066, 1070 (2d Cir. 1972). Appellants have not made a showing that any of the alleged inconsistencies are subject to the condemnation of this rule.

Thus, the fact that an elevator strike may have delayed occupancy of the North Conduit Avenue apartments until November, 1969 (A 158, 361), in no way suggests that Bergersen made a knowing misstatement in the affidavit in relating that on

*At the very least, appellants must exhaust their state remedies on this latest claim. Appellants have the burden of showing either (1) that they "fairly presented to the state courts" the same constitutional claims relied upon in their federal application (see Picard v. Connor, 404 U.S. 270 [1971]; United States ex rel. Gibbs v. Zelker, 496 F.2d 991 [2d Cir. 1974] or (2) that there was no available remedy to review this claim. 28 U.S.C. § 2254(b). Appellants have shown neither.

October 6, 1969, the informant told him that appellants were processing narcotics at that address. Whether the informant lied to Bergersen is of no consequence, so long as the affiant was ignorant of the deception and made an accurate representation of what was told him. United States v. Sultan, supra, at 1970.* Nor would such a negligently made statement be material since ample additional evidence supporting probable cause was presented in the affidavit at the time the warrant was issued.

So, too, the record fails to sustain the claim that Bergersen's later testimony controverted his sworn statement that he saw appellants enter apartment 2R on February 1, 1970. The mere fact that he could not recall that episode at the suppression hearing (A 42-43) is hardly an admission that he did not see appellants enter the apartment (see Lyons' br., p. 8). Neither is it material to probable cause, for it is undisputed that Bergersen (as he stated in his affidavit and later testified [A 51]) again saw appellants enter apartment 2R on February 8, 1970. The inability at the hearing to recollect exactly when the informant imparted this information to him (A 37-38) or when he was told that appellants would "bag-up" on November 8, (A 46-48) likewise casts no uncertainty on the truth of the statement in the affidavit.

*In any event, the cited testimony does not negate the possibility that appellants were in fact processing narcotics at North Conduit Avenue on October 6, 1969, since the second-floor apartment was easily accessible via the stairs and was found to be sparsely furnished, even on the day the warrant was executed (A 341).

The additional allegations merit only brief response. The first of these -- that Bergersen's testimony at the 1970 suppression hearing differed from that at the second trial regarding the length of time he knew the informant (Mapp br., p. 28) -- is not in conflict with any statement in the affidavit, and thus precludes application of the above rule. (It may be noted that Bergersen gave similar testimony at the 1970 hearing [see A 20 and A 28]. The seeming "inconsistency" may be explained by the fact that the informant was registered with the New York City Police Narcotics Bureau [A 78], and Bergersen may have seen or known of him without having met or spoken to him until October 6, 1969).

The second allegation -- that the prosecutor's summation was at variance with both the affidavit and testimony -- is equally irrelevant. Rather than raising a suspicion of police perjury (Lyons br., p. 10, 28)*, it merely suggests that the prosecutor should have studied the facts of the case more carefully.

In sum, the "inconsistencies and variances' in testimony alleged here are either unrelated to statements in the affidavit or fail to contradict them. No intentional misstatements have been proved and the critical issue of materiality is totally absent. Thus, there is no basis for remedial action by this Court.

*In an attempt to bolster a meritless argument, appellants promote an unfair and unsupportable inference from Bergersen's alleged dismissal from the police force on charges wholly unrelated to this case (Mapp br., p. 8, fn. 8; Lyons br., p. 10, fn.).

POINT III

APPELLANT LYONS HAS NO STANDING TO CONTEST THE SEARCH AND SEIZURE AT THE NASHVILLE BOULEVARD PREMISES. IN ANY EVENT, THE RENT RECEIPTS WERE PROPERLY SEIZED UNDER THE "PLAIN-VIEW" DOCTRINE.

Appellant Lyons argues that there was no probable cause supporting the search of the Nashville Boulevard premises (Lyons br., Point II), and that seizure of rent receipts at that address exceeded the scope of the warrant (Id., Point III). These claims must fail since appellant Lyons has no standing to contest the search and seizure at the Nashville Boulevard premises.*

It is elementary that Fourth Amendment rights are personal rights which may not be vicariously asserted by one who was not himself the victim of an invasion of privacy. Jones v. United States, 362 U.S. 257, 260 (1960).

In Jones, the Supreme Court liberalized the requirement that standing could be predicated solely upon the showing of a proprietary or possessory interest in the premises searched. The Court held that Fourth Amendment rights could also be asserted by an individual, (1) when possession of the seized evidence is an essential element of the crime charged, or (2) when he is

*Moreover, even if he had standing and could successfully challenge the search of the Nashville Boulevard premises, Lyons' conviction would remain unimpaired since he was arrested in possession of heroin, having just left the apartment where an additional cache of heroin was found.

legitimately on the premises when the search occurs. Jones v. United States, supra, at 264-265. See also, Simmons v. United States, 390 U.S. 377, 390 (1968); Brown v. United States, 411 U.S. 223, 229 (1973).

It is clear that appellant Lyons can satisfy none of the Jones requirements for standing to contest the search and seizure at Nashville Boulevard. First, Lyons was not present at the Nashville Boulevard premises when it was searched since he had already been arrested at the North Conduit Avenue location and incarcerated (A 56 - A 57). Second, the crime charged in the indictment was possession of a dangerous drug (A 5), not possession of the seized rent receipts. Third, Lyons has heretofore alleged no proprietary or possessory interest in the Nashville Boulevard premises, and may not make such a claim for the first time on appeal. United States v. Capra, 501 F.2d 267, 272 (2d Cir. 1974), cert. den. __ U.S. __.

Nor can it be suggested that evidence which may be inadmissible against one defendant or conspirator is for that reason inadmissiable against his codefendants or coconspirators.*

*Although appellants jointly raised these specific issues in the State court proceedings, appellant Mapp has apparently abandoned them before this Court, relying instead on the broader claim of lack of probable cause in issuance of the warrant as a whole. (See Mapp br., p. 18, fn. 17).

A codefendant or coconspirator who may be aggrieved by the introduction of damaging evidence derives no special standing from that status alone. Alderman v. United States, 394 U.S. 165, 171-172 (1969). Under these circumstances, this Court should not entertain the claims raised by appellant Lyons in Points II and III of his brief.

When viewed on the merits, the claims are equally untenable. As has been shown, the informant's information, as corroborated by independent police investigation, provided more than sufficient probable cause to support issuance of the search warrant for both premises (see Point I, supra).

So too, seizure of the rent receipts at the Nashville Boulevard premises was fully justified under the "plain-view" doctrine, in spite of the fact that the receipts were not mentioned in the warrant. In Coolidge v. New Hampshire, 403 U.S. 443 (1971), the Supreme Court held that where the police, pursuant to a warrant, are conducting a search of a given area for specified objects and inadvertantly come across a piece of evidence incriminating the accused, a warrantless seizure may be made. The only applicable limitation upon such a seizure is that discovery of the evidence be inadvertant; that the police

must not know in advance the location of the evidence nor have an intention to seize it, 403 U.S. at 469-470.

The circumstances of the instant case fall squarely within the "plain-view" exception. During the course of the Nashville Boulevard search -- pursuant to a warrant -- the police came across rent receipts in a dresser drawer bearing the name "Smalls" for apartment 2R at 155-15 North Conduit Avenue. It was immediately apparent to the police that they had evidence before them which connected appellants to the apartment where narcotics had just been seized.

Although the police knew from their prior investigation that the receipts had been issued, they had no reason to believe that they still existed or where they might be located. The discovery of the receipts was totally fortuitous and inadvertant. To have ignored the receipts until a warrant particularly discribing them could be obtained may well have jeopardized the continued existence of the evidence. Under these circumstances, seizure of the rent receipts was fully justified.

Appellant's reliance on Marron v. United States, 275 U.S. 192 (1927) for the proposition that objects not particularized in the warrant may not be seized, is wholly misplaced

in light of this Court's recent opinion in United States v. Rollins, __F.2d__(2d Cir., Sept. 15, 1975 NYLJ Sept. 29, 1975, p. 1). As Judge Hays noted, "the Supreme Court's decision in Coolidge v. New Hampshire, supra, casts doubt on the continuing validity of such reliance [on Marron]," Id., at fn. 5.

POINT IV

DISCLOSURE OF THE INFORMANT'S IDENTITY WAS NOT REQUIRED IN THIS CASE.

At the close of the 1970 suppression hearing, appellants moved for disclosure of the informant's identity. The trial court denied the motion in an opinion dated November 18, 1970 (O'Connor, J.), holding that "The officer's observations were sufficient, quite apart from the informant's communication, to establish that probable cause existed to support the issuance of a warrant. Since that is so, the People were not under the necessity of disclosing the identity of the informant" (A 7-j - A 7-k). The findings of the State court are entitled to the presumption of correctness under 28 U.S.C. 2254(d), as discussed under Point II, pp. 20-21, supra. The result, in any event, is the same when the well-settled rules of this Circuit are applies to the facts here.

Appellants concede that law enforcement officers are generally privileged to withhold from disclosure the identity of persons who furnish information of violations of the law. Scher v. United States, 305 U.S. 251, 254 (1938). They argue, however, that application of the privilege is limited where "the disclosure of an informer's identity, or the contents of the communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause." Roviaro v. United States, 353 U.S. 53, 60-61 (1957).

In McCray v. Illinois, 386 U.S. 300, 309 (1967), the Supreme Court distinguished Rovario, finding that it was addressed only to a situation where disclosure of the informant was necessary at trial on the issue of guilt or innocence and the informant was the sole participant in the crime with the defendant, 386 U.S. at 309.* McCray firmly establishes the principle that the Constitution does not require disclosure of an informant at a pretrial hearing to determine probable cause, even where his information is the only basis for probable cause, 386 U.S. at 312-313.

*To bring their case within the Roviaro rule, the burden was on appellants to show that disclosure would serve a necessary or useful purpose. Having failed in any way to sustain that burden, there was no abuse of discretion in refusing to require disclosure. United States v. Ortega, 471 F.2d 1350, 1359 (2d Cir. 1972), cert. den. 411 U.S. 935; see also, United States v. Alvarez, 472 F.2d 111, 113 (9th Cir. 1973), cert. den. 412 U.S. 921 (1973).

The rule in this Circuit regarding disclosure of an informant where the issue is probable cause is set out in United States v. Tucker, 380 F.2d 206 (1967): Disclosure of the informant's identity is required only when his information constitutes "'the essence or core or main bulk' of the evidence brought forth which would otherwise establish probable cause." 380 F.2d at 212. Thus, where independent police investigation or personal observation corroborates the informant's information, disclosure is not necessary. United States v. Commissiong, 429 F.2d 834 (2d Cir. 1970); United States v. Colon, 419 F.2d 120 (2d Cir. 1969); United States v. Shyvers, 385 F.2d 837 (2d Cir. 1967), cert. den., 309 U.S. 998 (1968).

As has been shown (Point I, supra), the independent police investigation corroborating the informant's information as well as their personal observations established adequate probable cause to make disclosure of the informant's identity superfluous in this case. Where "the informant's information had turned out to be accurate as to appellant's selling activities, and the agent's personal observations gave sufficient confirmation that appellant was selling narcotics . . . the names of the informers need not be disclosed when the issue is probable cause" [citations omitted]. United States v. Shyvers, supra, at 839.

POINT V

HABEAS CORPUS DOES NOT LIE TO TEST THE SUFFICIENCY OF EVIDENCE SUPPORTING A STATE COURT CONVICTION; NOR HAS APPELLANT MAPP SATISFIED THE EXHAUSTION REQUIREMENT OF 28 U.S.C. § 2254(b) WITH RESPECT TO SUCH CLAIM. IN ANY EVENT, THE EVIDENCE WAS SUFFICIENT FOR CONVICTION.

Appellant Mapp claims that her conviction was based on absolutely no evidence at all that she possessed narcotics and therefore, her conviction violated due process of law. This Court has long held that a claim that a conviction was not supported by sufficient evidence "is essentially a question of state law and does not rise to federal constitutional dimensions," e.g., United States ex rel. Terry v. Henderson, 462 F.2d 1125, 1131 (2d Cir. 1972); United States ex rel. Griffin v. Martin, 409 F.2d 1300, 1302 (2d Cir. 1969); United States ex rel. Jenkins v. Follette, 257 F. Supp. 533, 534 (S.D.N.Y. 1965), absent a record so totally devoid of evidentiary support that a due process issue is raised. Vachon v. New Hampshire, 414 U.S. 478 (1974); Garner v. Louisiana, 368 U.S. 157, 163 (1961); Thompson

v. Louisville, 362 U.S. 199, 206 (1960); United States ex rel. Terry v. Henderson, supra; United States ex rel. Jenkins v. Follette, supra.* "The writ of habeas corpus has limited scope; the federal courts do not sit to re-try state cases de novo but, rather, to review for violation of federal constitutional standards." Milton v. Wainwright, 407 U.S. 371, 377 (1972).

Appellant Mapp's concession that this issue is raised here for the first time makes obvious an additional defect which is fatal to the claim.** That is, she has failed to demonstrate that she has exhausted her available state remedies. (See Note, Point II, p. 22, supra).

*The purpose of the rule, inter alia, is to maintain the delicate balance of the federal-state judicial relationship, which is subject to considerable stress whenever a federal court is called upon to review a state conviction. See Darr v. Burford, 339 U.S. 200, 204 (1950); United States ex rel. Cleveland v. Casscles, 479 F.2d 15, 19 (2d Cir. 1973). Without such a rule, the federal courts would assume the role of the state appellate courts every time such a claim was made. Such a role is not contemplated within the scheme of federal habeas corpus review. Cf. Schaefer v. Leone, 443 F.2d 182, 195 (2d Cir.), cert. den. 404 U.S. 939 (1971).

**The omission of this claim in the prior proceedings is now explained as the result of Mapp's representation by a member of the same firm as Lyon's counsel when their interests as defendants were in conflict (Mapp br., p. 5, fn. 6; p. 11, fn. 10; p. 13, fn. 12). However, at the start of the 1972 suppression hearing, the Court brought to appellants' attention the association of their respective counsel. Both Mapp and Lyons stated they were satisfied to proceed with counsel and would not then nor in the future raise the issue of conflict of interest (A 107-109).

In any event, ample evidence was presented upon which the jury could find appellant Mapp guilty as charged. In fact, the evidence set forth in appellant Mapp's brief at pages 13-17 more than suffices to rebut the claim that her conviction was predicated on no evidence whatsoever.

CONCLUSION

THE JUDGMENT OF THE DISTRICT COURT SHOULD BE AFFIRMED.

Dated: New York, New York
November 24, 1975

Respectfully submitted,

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STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MARILYN L. HOWARD, being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Respondents-Appellees herein. On the 24th day of November, 1975, she served the annexed upon the following named persons:

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in the within entitled proceeding by depositing three true and correct copies thereof, properly enclosed in a postpaid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said attorneys at the addresses within the State designated by them for that purpose.

Marilyn L. Howard
MARILYN L. HOWARD

Sworn to before me this
24th day of November, 1975

Margaret Evans Rifler
Assistant Attorney General of
the State of New York